No. 95-1697

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

C. KEITH SCHAFER, JOHN TWIEHAUS, ROBERT O. MUETHER, JACQUELINE HOWARD, KELLY SHAW and PEGGY DUNLAP,

Petitioners,

vs.

WAYNE and ALICE KENNEDY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a suit brought against state mental health officials under 42 U.S.C. §1983, did the Eighth Circuit Court of Appeals err in vacating a grant of summary judgment to those officials when they failed to present evidence to show that a minor mental patient who was voluntarily admitted to the state facility was still present at the facility on a voluntary basis at the time of the alleged violations?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Eighth Circuit, reported at *Kennedy vs. Schafer*, 71 F.3d 292 (1995).

INTRODUCTION

Petitioners have misstated the question presented for review by this Court. Petitioners' recitation of the questions presented posits that the Eighth Circuit held that respondents' daughter – a voluntarily committed, minor mental patient in a state facility – had the same due process rights as an involuntarily committed patient. This is a misstatement of the Eighth Circuit's opinion which has unfortunately been picked up and continued in the *Amici Curiae* brief in support of petitioners' petition. The Eighth Circuit merely held that petitioners' motion for summary judgment should not have been granted because the bare-bones record generated in connection with that motion was insufficient to let the Court decide whether, under the Missouri statute at issue here, the minor mental patient's status had or had not changed from the time of her admission to the time of her death. The Eighth Circuit remanded the case for determination of this factual matter.

In petitioners' view, the fact that a person is voluntarily committed is legally conclusive as to a state's liability in section 1983 cases; thus, the argument goes, summary judgment should be automatically granted once a state files an affidavit attesting that a patient was voluntarily admitted to a facility, regardless of whether the patient's mental condition worsened since the time of admission and regardless of whether the patient is no

longer entitled to voluntary release under the applicable state statute. The court of appeals did nothing more than hold that petitioners are not entitled to a grant of summary judgment when their supporting affidavit failed to address this issue, and the court remanded for fact finding on that point. As we now explain, the scope of the decision is far less sweeping than petitioners suggest, and the petition should be denied.

STATEMENT OF FACTS

Respondents filed this action against petitioners in the United States District Court for the Eastern District of Missouri pursuant to 42 U.S.C. §1983, by which they sought to recover actual and punitive damages sustained as the result of the suicide of their minor daughter Kathleen while she was confined as an inpatient at Hawthorn Children's Psychiatric Hospital ("Hawthorn") in St. Louis County, Missouri. Hawthorn is a mental health facility operated by the Missouri Department of Mental Health ("DMH"). Petitioners are state officials and/or supervisory employees of DMH.

Kathleen committed suicide on April 8, 1992. From March 30, 1992, through the date of her death, she was placed, and remained, on patient precautions which required the staff to keep her in constant line of sight because she had been diagnosed as being at risk of suicide. 71 F.3d at 293. Once an inpatient – even a voluntary minor inpatient – is subjected to the precautions, the right to leave the facility is no longer absolute, but is subject to the approval of the head of the facility. Missouri law

provides that the head of a mental health facility may refuse release of even voluntary minor inpatients when it is determined that there is a likelihood of serious physical harm to the minor or others. Section 632.155(2) Rev.Stat.Mo. (1986).

In District Court, respondents alleged that Kathleen had a due process liberty interest in a safe and humane environment and that petitioners owed her a duty to protect her from injuries inflicted by herself, including suicide. Respondents further alleged that petitioners recklessly and callously disregarded and breached this duty by failing to provide adequate staff and services to protect patients such as Kathleen, when they knew or should have known that the longstanding and chronic understaffing at Hawthorn caused patients such as Kathleen to be in imminent danger of serious harm from self-inflicted injuries, including suicide.

Petitioners filed a motion to dismiss and alternative motion for summary judgment in which they claimed that since Kathleen had been admitted as a voluntary – as opposed to involuntary – patient, she did not have a due process liberty interest in a safe and humane environment. Petitioners also claimed that they were shielded from liability for Kathleen's suicide by the doctrine of qualified immunity. The motions were supported by a brief affidavit from the director of Hawthorn attesting to Kathleen's voluntary admission.

The District Court granted petitioners' motion for summary judgment and found that petitioners did not owe voluntary patients a duty to provide them with a safe environment and to protect them from harm, and

further found that even if petitioners did have a duty to protect voluntary patients from harm, the duty was not in any event clearly established enough to make them liable for Kathleen's death.

On appeal, the Eighth Circuit reversed the entry of summary judgment. The Eighth Circuit agreed with petitioners that an action brought by a voluntary patient was subject to a qualified immunity defense. The Court nonetheless held that the Missouri statute which allows the State to restrain those in Kathleen's condition *may* have constituted a sufficient restraint on Kathleen's ability to act on her own behalf as to trigger the protections of the Due Process Clause. The Eighth Circuit concluded that a question of material fact existed concerning *whether Hawthorn had restricted* Kathleen's ability to act on her own behalf to such an extent that she had become, in effect, an involuntary patient. The Court explained its holding as follows:

> "We hold only that a Missouri statute ***may*** effectively restrain those in Kathleen's condition and under the care of the State from acting on their own behalf to such an extent as to trigger the protection of the Due Process Clause. It is not Kathleen's worsening medical condition alone that ***may*** have converted her status to that of an involuntary patient. Rather, her worsening condition plus the duty placed on state officials by the statute ***may*** have had this effect." (italics and emphasis added)

71 F.3d at 295.

The cause was remanded to the District Court for further proceedings, to make the factual determination whether Hawthorn *had* so restricted Kathleen's ability to act on her own behalf that she had become, in effect, an involuntary patient. Petitioners' rehearing petition and suggestion for rehearing en banc were denied.

REASONS FOR DENYING THE WRIT

I. PETITIONERS RAISE NO LEGAL ISSUES WHICH WARRANT REVIEW BY THIS COURT.

A. The Eighth Circuit's decision is not a final determination for purposes of review by this Court.

1. The decision does not finally resolve the issues between the parties, and the trial court may well render a verdict in favor of petitioners which would moot the issues raised in the petition.

Petitioners' argument would have one believe that the Eighth Circuit has already found Kathleen's parents to be entitled to relief. Regrettably from respondents' standpoint, this is not true. The decision simply remands the case for further proceedings in the District Court because the record was insufficient for the Eighth Circuit to conclude, one way or the other, as a matter of law, that Kathleen's ability to act on her own behalf had been so restrained that due process protections had been triggered. This determination does not warrant a grant of discretionary review by this Court.

2. Petitioners have both misstated elements of the decision and overstated the effect of the decision.

Petitioners have repeatedly misconstrued and overstated the implications and consequences of the decision below. In Point I, at page 10 of their petition, for example, petitioners attempt to create a conflict between the Eighth Circuit's decision in this case and the decisions of other circuits. Petitioners assert that the Eighth Circuit acknowledged that three circuits have refused in the wake of *DeShaney vs. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), to extend due process protection to those who voluntarily enter the state's custody. That statement may be true enough as far as it goes, but it does not address the precise issue presented here. Petitioners' attempt to create a conflict is, moreover, disingenuous because the cited portion of the Eighth Circuit's opinion then continues as follows:

> "We need not address this issue, however, because the question was sufficiently doubtful, viewed from the perspective of a reasonable state official at the time of Kathleen's death, to make it impossible for us to say that the law was clearly established at that time . . . In other words, ***we agree with the District Court that defendants are entitled to the defense of qualified immunity*** if Kathleen is properly classified as a voluntary patient." (italics and emphasis added)

71 F.3d at 294.

There is therefore no conflict whatsoever between the Eighth Circuit's holding in this case and in the cases from other circuits which have refused to grant due process protection to voluntary patients. Petitioners' asserted conflict is illusory.

At page 11 of their petition, petitioners further assert that the decision creates a "new category of patients" entitled to substantive due process protection. This is simply not true. The trier of fact will still be required to determine, *inter alia*, that the mental patient was *not free* – as in restrained – to leave the particular facility at the time of harm before relief can be granted.

Petitioners are correct, however, when they state – again at page 11 of their petition – that state mental health officials have to assume that anyone can be transformed into an involuntary patient. This has *always* been the case, but it only happens when the state somehow restricts the ability of an individual to act on his or her own behalf.

Petitioners next complain that the decision means that a person may be entitled to due process rights even though the state "did nothing" to restrict the patient's liberty. This too is not true. Petitioners overlook the fact that the case has been remanded to determine *whether* the state did anything to restrict Kathleen's liberty, as the following language indicates:

> "A genuine question of material fact exists concerning *whether* Hawthorn had restricted Kathleen's ability to act on her own behalf to

> such an extent that she had become, in effect, an involuntary patient." (italics added)

71 F.3d at 296.

In Point II of their petition, at pages 16-17, petitioners argue – in apparent reliance on *DeShaney* – that the Eighth Circuit's opinion will improperly create a disincentive for state officials to take in voluntary patients because of fear of potential section 1983 liability.[1] Setting aside petitioners' misreading of *DeShaney*, petitioners' argument is yet another example of petitioners' overstating the implications of the Eighth Circuit's holding. The Eighth Circuit opinion does *not* hold that voluntary patients have the same due process rights as involuntarily committed patients. The case was remanded back to the District Court for trial precisely because the Eighth Circuit was unwilling to reclassify Kathleen's status to "involuntary" without further evidence. The case was before the Court on review of a motion for summary judgment, and not to determine the sufficiency of evidence developed after discovery and a trial on the merits. If, on the other hand, a voluntarily admitted patient is

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[1] Petitioners' reliance on *DeShaney* for any point in this case is misplaced, because the voluntary/involuntary issue was neither present nor argued in *DeShaney*. The following paragraph from *DeShaney* illustrates the point:

> "The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harm Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor."

489 U.S. at 201.

subsequently restrained from acting on his or her own behalf, there is nothing magic in the manner by which the patient was admitted which would or should shield state officials from section 1983 liability.

Finally, at page 20 of their petition, petitioners argue that the Eighth Circuit's analysis has created different substantive due process rights which will vary from state to state. This is not true. The key inquiry for trial courts will remain whether the individual's liberty has been sufficiently restrained to trigger due process protection. This standard will *not* vary from state to state.

Petitioners' real complaint is that the Eighth Circuit did not view the limited evidence presented by petitioners in a light most favorable to petitioners. This is never the case on review of a grant of summary judgment, when the standard of review is that the facts must be viewed in a light most favorable to the party opposing the motion. *Ailshire vs. Darnell*, 508 F.2d 526 (8th Cir. 1974).

To put the petition in perspective, it may be useful to review here where the parties agree and disagree. There is no dispute that a State may be liable for section 1983 violations involving patients who are involuntarily present in a state mental health facility. Nor is there any dispute – following the Eighth Circuit's opinion, which shall be the law of the case on remand – that a State enjoys qualified immunity in suits brought by patients who are voluntarily present at such a facility. Petitioners contend alone, however, that a district court should not determine liability by asking whether a patient was present voluntarily when the alleged section 1983 violation

occurred; in their view, the determinative factor – indeed, the only factor – is whether the patient *entered* the facility voluntarily, regardless of how the patient's condition may have changed after the time of admission and regardless of whether that patient is no longer free to discharge himself or herself under the state's commitment statute. The Eighth Circuit did nothing more than examine the voluntariness of Kathleen's confinement under the precise requirement's of Missouri's commitment law and conclude that it was unable to render a conclusion one way or the other on the basis of the single, sketchy affidavit presented by petitioners in support of their motion for summary judgment.

B. The Eighth Circuit's decision does not conflict with any existing authority of this Court or any other Circuit.

1. The decision does *not* decide whether a *voluntary* mental patient enjoys the same due process protections as an involuntary patient.

As noted in Point I.A.2., above, the decision does not conflict with any existing authority. The Eighth Circuit disavowed any attempt even to address the question whether a voluntary mental patient enjoys the same due process protection as an involuntary patient with the following language:

> "[T]his disposition makes it unnecessary to address the question whether a voluntary mental patient enjoys the same due process protections as an involuntary patient. It is prudent, and in keeping with the precedents, to postpone

> consideration of this difficult constitutional question until we are certain that its consideration is necessary."

71 F.3d at 295.

2. The decision does conflict with an earlier Eighth Circuit decision, but the Eighth Circuit's election to ignore the earlier decision worked to Petitioner's advantage.

Insofar as the Eighth Circuit decision holds that petitioners would be entitled to a qualified immunity defense to plaintiffs' claim in the event it is determined that Kathleen's status had not been changed, in effect, to that of an involuntary patient, it does conflict with an earlier decision of another panel of Eighth Circuit judges, *Goodman vs. Parwatikar,* 570 F.2d 801 (8th Cir. 1978). While a perceived tension between two decisions of the same federal appeals court may be an argument for *en banc* review [*See, Krause vs. Perryman,* 827 F.2d 346 (8th Cir. 1987)], it hardly qualifies as a basis for this Court to grant review to resolve an intra-circuit conflict. In *Goodman,* the Eighth Circuit discussed the State of Missouri's constitutional duty to protect *all* inpatients in a state mental institution, both voluntary and involuntary, with the following language:

> "[O]nce Rachel was admitted as a patient, *voluntary or involuntary,* she had a constitutional right to a basically safe and humane environment. . . . The state has a duty to provide a humane living environment which includes a duty to protect inmates from assault by fellow inmates and

> staff, which if callously disregarded may constitute a violation of civil rights." (italics ours)
>
> and
>
> "If plaintiff proves that defendant either knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of Rachel, . . . plaintiff would be entitled to damages from that defendant."

570 F.2d 801, at 804-805.

The Eighth Circuit's decision in this case simply notes that prior to *DeShaney, Goodman* accepted respondents' argument that the manner in which the person enters the custody of the state is not the dispositive question in determining whether a patient is entitled to due process protection, but rather the Court should look to the amount of control the state exercises over the patient's life. The Eighth Circuit then proceeded to hold that the issue need not be addressed in this case, because the law after DeShaney was not so clearly established that petitioners would be shielded from liability for Kathleen's death by the qualified immunity defense – if she is found to be truly classified as a voluntary patient.

Respondents only mention *Goodman* in order not to waive argument over its viability in the event this Court should choose to grant certiorari or in the event the case should come before the Court at some later time. The conflict between the Eighth Circuit's holding and *Goodman* is of no avail to petitioners, however, because petitioners benefitted from the Eighth Circuit's refusal to follow the earlier case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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